

The Consumer's Right of Withdrawal under the Law 18-09

حق المستهلك في العدول في ظل القانون 18-09

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RECEIVED
23 - 06 - 2020

ACCEPTED
16 - 09 - 2020

PUBLISHED
30 - 09 - 2020

Abstract:

The right to withdraw from the contract is considered as a legal mean created by the legislator under Law 18-09 amended and supplemented of Law 09-03 on consumer-protection and prevention of fraud by giving the consumer a limited period to consider and prudence before concluding the contract, so that his consent is not hasty in making the decision, which restores the contractual balance.

As an implementation of right of withdrawal and the necessity to explain methods of benefit for the consumer; the legislator has devoted many legal acts that acknowledge the mandatory of the involved through regulations such as the exercise of this right empowered to the consumer and stating its implications.

Key words:

Right of Withdrawal, Consumer, Professional, Contract - legal deadlines.

المخلص :

يعتبر الحق في العدول عن العقد وسيلة قانونية أوجدها المشرع بمقتضى القانون 18-09 المعدل والمتمم للقانون 09-03 المتعلق بحماية المستهلك وقمع الغش من خلال منح المستهلك مدد زمنية محدودة للتفكير والتروي قبل ابرام العقد ليكون رضاه غير متسرع في اتخاذ القرار مما يعيد التوازن العقدي. وتطبيقا لهذا الحق في العدول وضروره لبيان كفاءات إفادة المستهلك منه كرس المشرع العديد من النصوص القانونية التي تقر بالزامية المتدخلين من خلال جملة من الضوابط كممارسة هذا الحق المخول للمستهلك مع بيان الآثار المترتبة عنه.

الكلمات المفتاحية:

حق العدول - المستهلك - المهني - العقد - الآجال القانونية.

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Introduction:

The technological developments that we are witnessing today in the methods of production, the nature of products, and the diversity in the markets, made the consumer buy and his decision is influenced, several times, by the advanced advertising methods used by the presenters to promote their products, which often doesn't meet the consumers' expectations. This can cause harmful risks to the consumers' health and safety which urges the legislator to intervene in order to effectively protect the consumer and ensure the integrity of the contractual relationship by creating a balance between a consumer who lacks capabilities, experience, and time to consider and prudence before concluding the contract with a strong, economically superior party. In such circumstances, the legislator has worked to develop the right of withdrawal under Law 18-09 amended and supplemented of Law No. 09-03 related to consumer protection and the prevention of fraud as a guarantee for this weak party, by giving him a cooling-off period in order not to rush in taking final decision of concluding a contract that he may had not thought carefully about its implications. It is the goal through which we seek giving new connotation in conformity with developments in this field.

Based on that, our research problem is: What is the legal framework approved by the legislator for the consumer's right to withdraw from the contract? That we are trying to answer by relying on the descriptive approach to define the various concepts related to the topic, and the analytical approach through an analysis of some legal acts. We divided our research into two main sections; the first subsection entitled the consumer's right to withdraw from contracting, addressing its meaning and the scope of application, while in the second subsection addresses the legal regulation of the consumer's right to withdraw from contracting in order to exercise the legal controls of this right and then its implications for either the consumer or professional.

Section I: The consumer's right to withdraw from the contract:

Most of the consumption contracts take place between a professional intervener and an ordinary consumer who often lacks experience that enables him to consciously buy the product on one hand, and not having sufficient time or opportunity to think before concluding the contract on the other hand.

For this reason, the right to consider or prudence is one of the most important rights that the legislator has approved for the consumer to preserve the

balance of the contract and the interests of the contracting parties that are different from one contract to another by the application scope of the right to withdraw.

A- The Meaning of the Right to Withdraw:

Since the right of withdrawal is one of the most important guarantees given to the consumer in the context of his contractual relationship with the professional, defining his concept requires studying the definition of this right, then its legal nature.

1- Defining the Right to Withdraw:

Various and multiple definitions were set for the right of withdrawal, however most of them agreed on its effects, because this right shows the contractor's ability after concluding a contract to choose between completing or withdrawing from the contract ⁽¹⁾, some of scholars define it as a «legal feature that the legislator gave the consumer to withdraw from the contract, after concluding a contract or before without the consumer being responsible for that recurrence, or the other contractor 's responsibility for any damages »⁽²⁾.

Others define it as “a right that is approved to the consumer within a certain period starting from the delivery date, to choose between returning the sold item and replacing it or returning it without including other contracts that in which Equity is important in some other contracts, such as a service contract or credit contracts in which the consumer needs to determine this right”⁽³⁾.

Similarly, another defines it as “the right to return the product to the seller and refund or replaces the sold item within a certain period starting from the date of delivery”⁽⁴⁾

we note that the first definition linked the right of withdrawal to the existence of a full-fledged contract in which the consumer has the right to withdraw, whether at the stage of concluding or executing the contract, but it did not clarify whether the withdrawal is applied to goods only, or extends to services as well, and it did not refer to the price, i.e. is the professional obligated to return the price or not?, while the second definition included services and insurance contracts within the contract to which the right to withdraw is applied, as the consumer has the right to refund or replace the sold product.

According to the new law 18-09, the legislator defines the right to withdraw as “the consumer’s right to withdraw from purchasing a product without a reason”. ⁽⁵⁾

So as it is noted, the legislator used the term retreat when defining the right of withdrawal, and did not refer to the price. The right includes goods and

services because the term product is used to name both goods and services according to the third article of Law 09-03 amended and supplemented. However, he added in the second paragraph of the same aforementioned Article 19 that “The consumer has the right to withdraw from purchasing a product with respect to the contracting terms and without paying additional expenses ”.⁽⁶⁾

According to the legislator, the right of withdrawal is that the consumer is empowered to withdraw from contracting on his will, even if the professional does not violate any obligation as defined by paragraph 1 of the article No.19. Concerning the conditions stated in the second paragraph, it gives the consumer the right to withdraw without paying additional expenses, and that is, without compensating the intervener or the professional for the damage he suffers due to his withdrawal from the contract, which we consider unfair to the intervener

Regarding the products in which the consumer has the right of withdrawal, the legislator did not specify their types because there are many products which the consumer cannot be given a cooling-off period because of its damage. In addition to that he did not specify the period granted for the right of withdrawal that was stated in the last paragraph of Article 19, issued through a regulatory decree.

2- The Legal Nature of the Right of Withdrawal:

The issue of defining the legal nature of the right of withdrawal has evoked a wide jurisprudential controversy as a legal act emanating from the consumer's will and expressing the consumer's ability to withdraw from the contract. Some considered it a personal or objective right while others consider it a license; however, it is a purely voluntary right.

2-1- the Option of Withdrawal as a Right:

Although scholars agreed that withdrawal is a right, they differed in determining its type, some consider it a personal right which arises by relying on the contractual link between the creditor and the debtor, according to which the creditor can request the debtor to do or prevent a certain action. However, in case of withdrawal, there is no such authority, as the creditor cannot impose his authority over the debtor to claim the positive or negative, the right of withdrawal empowers the consumer either to complete or withdraw from the contract⁽⁷⁾Therefore, cannot be considered a personal right. On the other hand, some scholars consider it an objective right, it has direct authority over The object of the contract, i.e. the consumer has the right of withdrawal or canceling the contract by his own will, without incurring any responsibility, since his direct authority over the commodity or service gives him that right⁽⁸⁾ however; this

view is also criticized because the consumer does not have this power to exercise his right, but only to terminate the contract without requiring the intervention of the professional.

2-2- The Option of Withdrawal as a License:

This movement sees that the right of withdrawal a license which is "a realistic machine to use a freedom from public freedoms or any permissibility permitted by law in the matter of freedom from public freedoms"⁽⁹⁾, that is ; the license comes in a midlevel between the right and extreme freedom where its owner has powers that the other party does not have⁽¹⁰⁾, while the right of withdrawal is also established for the consumer only without the professional which makes some believe that it is a license. Despite the similarities, withdrawal cannot be considered as a license or freedom because the person's choice to contract with another person with whom The second party refused to contract, which means that there is freedom for both parties to contract, while we find the opposite in withdrawing from the contract. When consumer uses his right, the professional have to bend to the consumer's will.⁽¹¹⁾

2-3- The Option of Withdrawal as Purely Voluntary Right:

Through criticism pointed at previous views of scholars, this view implies that the voluntary right does not give its owner specific authority towards another person, such as the personal right or authority over concretes, such as the objective right, but rather gives the owner abstract authority that can affect the existing legal centre by modifying, canceling, and establishing alternative centers, all of this is purely the individual will of its owner,⁽¹²⁾ that is; the use of withdrawal is carried out only by the will of its owner.

It is a mechanism based on the authority to control the contract without considering the will of any other party, so we see that this view is closest, despite the conflicting opinions regarding the nature of the right of withdrawal, it is a specific right for the consumer who exercises it without interference.

B- The Scope of Application of the Right of Withdrawal:

Defining the scope of the right to withdraw is extremely important in the sense that it allows restricting the concerned; this is done through the consumer protection and prevention of Fraud Act. In the content, we find that there are two categories through which the personal scope of the right to withdraw is unified whereas the objective scope of this right is determined by products of various goods and services. The legal relationship parties urge the presence of given scope.

1- The Personal Scope of the Right of Withdrawal:

The personal scope of the withdrawal is determined by the beneficiary, the consumer, who is involved in legal and contractual relationship with the intervener who is intellectually better, and committed to this right.

1-1- The consumer; the owner of the right to withdraw:

The Consumer, according to Article three of Law 09-03, amended and supplemented by Law 18-09, is defined as “every natural or moral person who purchase, in exchange for a price or free, good or service addressed for final use in order to meet his personal needs or the need of another person ,or animal being taking care of. ”⁽¹³⁾

Based on the text of the article, the legislator has adopted the narrowed definition of the consumer as he made the purpose of consumption is to meet a personal or family needs, thus excluding any other purposes from the concept, i.e. the process of purchasing is considered, if it is to meet personal needs, then the matter is related to the contract of consumption, If the purpose is professional, then the transaction is excluded from the scope of the right of withdrawal

In this regard, another definition of the consumer, updated under Law 18-05 related to electronic commerce, in Article 6 stating that “every natural or moral person who buys with an exchange or free goods or services through electronic communications from the electronic resource for the purpose of final use” .⁽¹⁴⁾

We note that the legislator also adopted the narrow meaning of the consumer, and emphasized the ordinary consumer who purchases for end-use, that is, the two definitions differ only in that the latter is contracted electronically.

1-2- The Debtor Interferer:

The intervener is the second party in the consumption contract that has information, data, and knowledge which enable him to carefully contract compared to the consumer.

According to the text of Article Three (3), Paragraph 7 of the Consumer Protection and Fraud Prevention Law, the intervener is “Every natural or moral person who interferes in the process of offering products for consumption”. It is noted that the person committed to the right of withdrawal in confronting the consumer is the one who has a direct relationship, and that the idea of offering products for consumption includes various stages of economic life of The product; starting with production, storage, transport, distribution, and therefore the intervention in this case may be a product or a craftsman, a manufacturer, an importer ... etc.⁽¹⁵⁾

In the sense that the interferer might be a natural or moral person like companies, but what is noticeable is that the legislator doesn't have a particular definition, as we sometimes find the term professional, economic aid ... etc, but similar in being the second person who possesses economic power and knowledge in the field of goods and services that qualify him to outperform the weak consumer

In the text of Article Six (6) paragraph 4 of the Electronic Commerce Law under the name of the electronic resource, the legislator defines the consumer as "every natural or legal person who markets or suggest providing goods or services through electronic communications".⁽¹⁶⁾

As noticed in the text of the article, the legislator in this definition is limited who market or suggest the provision of goods or services.

2- The Objective Scope:

The objective scope of the right of withdrawal in the field of consumption is primarily determined by products of all kinds and forms, but the fact that it is necessary to limit the contracts in which the consumer is unable to exercise this right so as not to be arbitrary in its use in all contracts subject to be concluded. Since the legislator did not specify the list of products in which the consumer exercises the right of withdrawal, according to some scholars' opinions and European streams, we try to address some contracts in which the right of withdrawal is excluded as follows:

2-1- Contracts for Importing Customer-tailed goods

For customer-tailed goods, customer has no right of withdrawal because they were made according to his personal desires and at the request of him, and they are specific according to what he wanted, therefore he cannot invoke his right to withdraw.⁽¹⁷⁾

2-2- Contracts for Importing Perishable Goods:

If the goods are rapidly destroyed or damaged, it is unreasonable for the consumer to purchase it and then retract his decision to withdraw, because this means bad intention to harm the intervention.

2-3- Contracts for Importing Newspapers & Magazines:

This type of specified contract is not subject to the right of withdrawal, so it is not logical for the consumer to buy a particular magazine or newspaper, and after examining and reading its content, withdraw from his contract.

Consequently, this type of good is considered to be of a temporary nature.

2-4- Contracts Concluded by Auction:

The right of withdrawal gives the consumer enough time to think before deciding to purchase, however, this is not available in contracts concluded through public auction. The consumer decides in full freedom and will whether to enter the auction or not, and this means excluding his right to withdraw.⁽¹⁸⁾

Finally, it can be said that the objective scope of the right to withdraw remains at the discretionary power of the legislator to approve the contracts in which the consumer can withdraw. This is what we are waiting for since the promulgation of Law 18-09 and the legislator's assertion in the text of Article 19/3 that the list of products is determined by regulation, that is, within two years no decision has been issued for this right.

We only hope to consider the balance between the two parties to the contractual relationship, i.e. the consumer in withdrawing, and not to harming the intervener during the process of issuing the list of products.

Section II: The Legal Regulation of the Consumer's Right to Withdraw from Contracting

The right of withdrawal is considered as one of the most important guarantees granted to the consumer in the field of consumer contract, which the legislator sought to strictly regulate, as it limits the principle of the binding force of the contract and therefore its exercise requires a set of legal controls to govern this contractual relationship that brings together each consumer, which is drawn from Failure to exercise the expiry of the contractual bond between them, and consequently, this legal system has implications for both parties.

A- Legal rules to Withdraw from the Contract:

The legislator did not specify how to exercise the right to withdraw, but pointed out in Article 19 of Law 18-09 the need to respect the contract conditions that will occur through regulation⁽¹⁹⁾. For the consumer to avoid conflict with the interferer, there must be known legislative rules in order to establish trust in transactions by enabling the consumer to authorize the exercise of the right of withdraw and the time limit for exercising this right.

1- The Consumer's declaration to Exercise the Right of Withdrawal:

The right to withdraw is considered a fixed and established right in the interest of the consumer by force of law, which guarantees him the will to express the withdraw from the contract and to declare the desire to contract, and it may be according to the text of Article 60 of the Civil Code explicitly as it may be implicitly, where the legislator stated that «expressing will pronounced, or in

writing or by known sign. It may also take a stand that leaves no doubt about its significance for the intended intent of its owner”⁽²⁰⁾. The expression of will may be implicit, if the law does not provide or the parties agree to be explicit.

The consumer has the right to express his will upon the contract without expressing the reason, as this right may be exercised by any means to express withdraw, as an example of this is stated in Article 11/2 of Executive Decree No. 15-14, relating to conditions and modalities of offers in the consumer loan field that “the seller is not obligated to hand over the sale or finance the goods, unless being notified by the buyer of his receipt of the loan. The buyer has the right to withdraw, in a period of eight days, starting from the date of signing the contract, according to the legislation and regulation in force”⁽²¹⁾.

This indicates that the declaration of the right to withdraw can be done through a written request, which is evident from the text, on the contract signature date.

European streams 83-2011 has established a kind of flexibility in the exercise of this right, as it is achieved through a professional notification of a desire to exercise its right to withdraw within a limited deadline, regardless of the method used, whether by filling in the form within specific deadline in traditional way which guarantees access or by modern methods such as internet. It is up to the consumer to prove his exercise of the right of withdraw within the specified legal deadlines.⁽²²⁾

Thus, in our view, the right of withdraw is considered valid even in the absence of what was mentioned before because these methods are only formalities that must be followed to avoid dispute with the interferer.

2- The Legal Period for Exercising the Right to Withdraw:

To preserve the contract and the interests of the contractors, a given period of time was determined for the consumer to exercise his right of withdraw, otherwise it fails, within the context of considering the interests of the contracting parties. However, there is no unified period for withdraw.

Despite the Algerian legislator stated in Law 18-09 related to consumer protection and the suppression of fraud, the issuance of a special regulation to limit the withdrawal period, which so far has not been issued, it states the right to withdraw in many legal texts such as Article 4 of the Executive Decree No. 06-306 determining the basic elements of contracts signed between economic agents and consumers as it states that “economic aid must inform consumer by all appropriate means of general and special conditions for the sale of goods and / or

the performance of services and give them sufficient time to examine and sign the contract”

This indicates that the legislator granted a period for the consumer to examine the contract terms and not to check the appropriateness of the product, however, he did not specify the withdrawal period.

Following Law 18-05 related to electronic commerce, Article 23 “the period has been determined as four (4) business days starting from the date of actual delivery of the product”.⁽²³⁾

Executive Decree No. 15-114 grants a period of eight (8) business days to withdraw from the consumer loan when the loan is specific goods with the calculation of the period starting from the date of the contract⁽²⁴⁾. It states that “the seller is obliged to deliver or finance the good subject of the contract unless after notification, one of the methods of the buyer is to collect the loan, however, it provides the buyer with a period of eight business days to withdraw, starting from the date of signing the contract according to the legislation and regulation in force.

Article 14 of the Executive Decree No. 15-114 stated that the sale may be withdrawn at the homes in the sense that “when product is sold at home, the withdrawal period is seven business days regardless of the date of delivery or the provision of goods. No cash payment can be made before the end of this period».

Similar to the Egyptian legislator who approved the exercise of the right of withdraw as follows: “Within 14 days of receiving any goods, the consumer has the right to replace or return it, with a refund, if the good is imperfect, or not conform to the specifications or the purpose for which it was contracted. In this case, at the request of the consumer, the supplier is obligated to change or return the goods with a refund, without additional fees”.⁽²⁵⁾

Finally, it can be said that the legislator, when issuing the regulation on the consumer's right to withdraw from the consumption, is supposed to settle the matter regarding the withdrawal period, as well as in terms of its difference between goods and services, where no conflict arises between the consumer and the interferer.

B- legal effects of exercising the right to withdraw:

The consumer's exercise of his right to withdraw is independent and on his own will without justifications, nor paying additional expenses. The right of withdrawal does not have effects either for him or for the professional. So, what is a right for the consumer is an obligation for the intervener and vice versa,⁽²⁶⁾ so we will try to clarify it for the consumer and for the professional.

1- The effects of exercising the right to withdraw in regard to the consumer:

The act of enabling the consumer to exercise his right to withdraw means cancelling the original contract, that is; ending the contractual relationship between the consumer and the professional. ⁽²⁷⁾ The consequent effect is considered to be the essence of the right to withdraw, as it is possible to return the goods and pay all expenses resulting from the right of withdrawal.

1-1- The obligation to return the product:

The consumer's right to withdraw entails cancelling the contract in which he is obliged to return the product to the intruder on its original state during the delivery to the intervener.

The legislator granted the consumer this right without paying additional expenses, as a way to restore the contractual relationship balance for fear of the consumer's reluctance to exercise this right, if it was with additional expenses. Therefore, withdrawal is free and conditioned to be exercised within the deadline so that it does not lead to consequences or penalty, except for the possible expenses for returning the product, as an applicable result of the distance between the two parties.

The consumer may be asked, in case of changing or causing any defect therein, to ensure that he does not use his right to prejudice the seller or to override the purpose of determining this right as an attempt to use the goods which reduces its value or loses its new properties, in order to ensure the safety of goods and their proper performance, which implies preserving the rights of others. ⁽²⁸⁾

1-2- support the costs of the refund:

The legislator stated, in Article 19 of Law 18-09 related to consumer protection and the suppression of fraud, ⁽²⁹⁾ that the consumer is not obligated to pay any expenses in the event that he is exercising his right to withdraw, however, he must pay all the expenses in case the product is returned to the intruder: shipping charges, Transfer, ... etc if there is a long distance between them.

It should be noted that the intervener has no right to request the consumer to pay other than what was stated. In contrast, European legislation imposes on the consumer to pay expenses of returning items which must be done as soon as it is stated in the first paragraph of Article 14 of European Directive No. 83-2011, because imposing any additional expenses on the consumer is not in line with the principle of the right to withdraw, ⁽³⁰⁾ which is what we hope the legislator will organize according to strict legal texts.

2- Effects of withdraw for the professional:

the consumer 's claim and exercise of his right to withdraw and the return of the product is an essential and direct effect in which the intervener ,as the owner of the product, must accept that legal right , returning the amounts paid by the consumer and terminating the contract.

2-1- The intervener's commitment to refund the price of the goods :

The legislator obliged the intervener, in case of the consumer's withdrawal, to return the price that was received from the professional as a value for that product that the consumer received. The legislator arranged a penalty stated in Article 78 bis of Law 18-09 related to consumer protection and the suppression of fraud in case the intervener refused to return the amounts paid by the consumer in exchange for his goods that is represented in the penalty of the fine where stated "to be punishable by a fine of fifty thousand Algerian dinars (DZD 50,000) to five hundred thousand Algerian dinars (DZD 500,000)".⁽³¹⁾

Whereas in the field of electronic commerce, the legislator obliged the intervener to return the price that it received from the consumer according to article 23 stating that "the paid amount must be returned within a period of fifteen (15) days starting from the date of receiving the product".⁽³²⁾

2-2- Terminating the contract:

Once the intervener returns the price of the product or service, the contract is terminated by the force of law, as if it didn't take place and the two parties are returned to their original state before the contract and all the consequences resulting from the withdrawal. This leads to the disappearance of the contract associated with it, if the consumer decides to withdraw the original contract, any other contracts will be cancelled. The cancelation of the sale contract will make the loan contract without interest or benefit to the consumer, thus cancelling all the subsequent commitment.

The Consumer Loan Law stipulates in article 11 that: "the seller is not obligated to deliver the goods subject of the contract unless he was notified that the buyer received the loan"⁽³³⁾ and this means that the withdrawal from the contract is automatically applied to any contract associated with it.

Conclusion:

The protection of the consumer and ensuring his safety is an urgent necessity dictated by the technological conditions and developments taking place in the production of goods and services, due to the imbalance of the contractual balance between the consumer as a weak party that lacks knowledge and awareness, by giving him a chance to consider and reconsider the contract that

signed with an intervener who has all the capabilities, qualified knowledge ,and economic strength, through setting the scope and how to exercise legally the right of withdraw that the legislator has established under Article 19 of Law 18-09, modified and completed of Law 09-03 related to consumer protection and the suppression of fraud, we have reached many results:

- The legislator did not afford any additional expenses to the consumer in case of returning the product to the intervener,

- He also gave the consumer time to think calmly and make decision before contracting, or withdraw from contract without providing any justification,

- The consumer's exercise of his right to withdraw is restricted by a certain time limit referred to by the legislator in Article 19 of Law 18-09, provided that it is indicated by regulation, which forfeits the consumer's right to practice once it has expired,

- The consumer also entails a number of effects or obligations in exercising The Right of Retraction from the Contract, which is represented in returning the product while bearing the costs of restitution, which corresponds to the obligation of the intervention to return the price to the consumer,

Through these results, we offer the following suggestions:

- The necessity of determining the period for the consumer to exercise his right to withdraw or withdraw from the contract and to take into account the difference between the goods and services, that is, in the sense of defining the list of products concerned.

- Granting the intervener the possibility to reject the consumer's right to withdraw in case of product defect

Finally, we are waiting for the legislator to expedite the issuance of the regulation on the right to withdraw in order to keep pace with the rapidly changing reality, especially as it indicated this under Article 19 of Law 19-09.

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- ⁽²⁹⁾ Article 19 of Law 18-09, above.
- ⁽³⁰⁾ Ahmad Rabahi, *op-cit*, p. 148.

(31) Article 78 bis of Law 18-09, on the protection of the consumer and the suppression of fraud, mentioned above.

(32) Article 23 of the aforementioned Law 18-05 related to electronic commerce.

(33) Article 11 of Law 15-114, relating to the terms and conditions for offers in the aforementioned consumer loan field.

